

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

IN RE: BAIR HUGGER FORCED AIR
WARMING PRODUCT LIABILITY
LITIGATION

MDL No.: 15-md-02666(JNE/DTS)

This Document Relates To:

GEORGE WOODARD,

Plaintiff,

Civil Action No.: 18-cv-01722

PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION TO DISMISS

NOW COMES Plaintiff, George Woodard, identified in Defendants' Motion to Dismiss for Failure to Comply with Pretrial Order No. 14 (Dkt.1829), and by and through undersigned counsel submits this, his Response to Defendants' Motion to Dismiss, and represents as follows:

FACTS AND ARGUMENT

Plaintiff contacted undersigned counsel regarding an infection and subsequent treatment that he experienced due to the use of a Bair Hugger Patient warming device during an orthopedic surgery. Counsel worked to obtain medical records and billing records to move forward with the case. On June 22, 2018 counsel filed the current action to comply with what was identified as the applicable statute of limitations deadline for the relevant claim. On September 6, 2018, Plaintiff served his Plaintiff Fact Sheet on Defendants.

Counsel for Plaintiff was advised of alleged deficiencies in the submitted Plaintiff Fact Sheet. Plaintiff and his counsel have repeatedly attempted to correct the deficiencies as is evidenced by the multiple PFS forms submitted. Despite multiple attempts, Defendants continued to allege deficiencies. The primary deficiencies raised by Defendants were limited to questions

regarding Bates Stamped identification of the Bair Hugger System (Question III(1)) and Plaintiff's emotional damages response (Question VI(3)). Specifically, in response to question III(1) Plaintiff supplemented his response to direct Defendants to the Bates stamped documentation in support of his response. This response sufficiently cured the alleged deficiency. With regard to question VI(3) Plaintiff supplemented his response but failed to provide an approximate date of onset. An additional supplementation was made to provide the date of onset. The production of this information therefore cured the purported deficiency alleged in question VI(3). Although Plaintiff has cured his alleged deficiencies, he remains on the Defendants Order to Show Cause list because he has submitted an undated verification. Counsel has mailed an updated verification to Plaintiff and is awaiting a signed and dated copy to be returned. Counsel will provide an updated verification promptly upon receipt of such. However, the lack of an updated verification should not result in a dismissal of Plaintiff's claims.

A dismissal with prejudice "should be used only in cases of willful disobedience of court order or where a litigant exhibits a pattern of intentional delay." *Hunt v. City of Minneapolis*, 203 F. 3d 524, 527 (8th Cir. 2000); *see also Hutchins v. A.G. Edwards & Sons, Inc.*, 116F.3d 1256, 1260; *Mann v. Lewis*, 108 F.3d 145, 147 (8th Cir. 1997) (quoting *Givens v. A.H. Robins Co.*, 751 F.2d 261, 263 (8th Cir. 1984)). In *Givens v. A.H. Robins Co.*, the court reversed a dismissal with prejudice where the litigants' only transgression was failure to comply with a discovery deadline. *Givens*, 751 F.2d 264, 264 (8th Cir. 1984). The court reasoned that dismissal with prejudice was disproportionate to this act of noncompliance. *Id.*

Given the nature of the deficiencies and Plaintiff's repeated good faith attempts to cure them, Plaintiff requests this Court deny Defendants Motion to Dismiss with Prejudice. Plaintiff

will suffer undue prejudice if he is not able to provide the signed verification when all other alleged deficiencies appear to have been cured.

CONCLUSION

Plaintiff George Woodard prays this Court deny Defendants Motion to Dismiss with Prejudice.

Dated: March 20, 2019

Respectfully submitted,

PENDLEY, BAUDIN & COFFIN, L.L.P.

/s/Christopher L. Coffin

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